Supreme Court, U.S.
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In The
Supreme Court of the United States

TERRANCE ROSS WILLAMAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

TERRANCE ROSS WILLAMAN
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(814) 425-2080
Pro se Petitioner

QUESTIONS PRESENTED

The following questions are presented by the petitioner:

I. Is the Second Amendment, U.S. Constitution, an individual right?

II. Does Congress have the authority to regulate the right specified in the Second Amendment, U.S. Constitution, through the enactment of ordinary legislation?

III. Does a defendant in a federal criminal case have the right to argue his understanding of the Constitution to a jury?

PARTIES BELOW

Petitioner Terrance Ross Willaman was the defendant in federal criminal case no. 04-00028-1E in the Western District of Pennsylvania. The Respondent is the United States of America. Petitioner Terrance Ross Willaman was the defendant-appellant in case no 05-1336 in the United States Third Circuit Court of Appeals. Respondent United States of America was the respondent-appellee in the court below.

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PETITION FOR WRIT OF CERTIORARI

Terrance Ross Willaman, on behalf of himself, hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit, filed on February 17, 2006. There was no good-faith determination of the law in petitioner's case in either the district court or the Third Circuit Court of Appeals.

OPINION BELOW

The Court of Appeals' Opinion affirming the judgment of conviction and sentence, entered January 27, 2005, is reproduced at Pet. App 1a-11a, reported at 437 F.3d 354 (3d Cir. 2006).

JURISDICTIONAL STATEMENT

The Court of Appeals' final judgment was entered on February 17, 2006. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves Article V and Amendment II of the United States Constitution.

Article V, United States Constitution provides:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Amendment II, United States Constitution provides:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.

STATEMENT OF THE CASE

Petitioner Willaman's case originated on March 26, 2004, when Maurice Ferentino, an ATF agent, and two other federal agents approached Willaman at a hotel in Erie, Pennsylvania, where he was staying with his wife. Ferentino, who had obtained information that Willaman possessed a machine gun, at that time intended to serve a grand jury subpoena on him, apparently related to an ongoing investigation regarding weapons matters.

Willaman admitted to Ferentino at the hotel that he possessed a machine gun but told Ferentino that he would turn it over to the agents. Willaman and the agents subsequently left the hotel in separate cars to retrieve the weapon at Willaman's residence. Once they arrived at the residence, he dug up the machine gun from the place where he had buried it, and the agents took possession of it.

On May 11, 2004, a grand jury indicted Willaman for knowingly and unlawfully possessing a firearm in violation of 26 U.S.C. § 5861(d), and, on September 15, 2004, a grand jury returned a superseding indictment charging Willaman with knowingly and unlawfully possessing a machine gun in violation of 18 U.S.C. § 922(o)(1).

Following the original indictment, Willaman appeared before a magistrate-judge on May 12, 2004, at which time she set bail. Nevertheless, Willaman was not arraigned until May 17, 2004, at which time he pleaded not guilty. On May 25, 2004, eight days after his arraignment, Willaman filed several pre-trial motions: (1) a motion to dismiss the indictment under Federal Criminal Rule 12(b)(2); (2) a motion to dismiss and a motion to suppress statements and evidence based on alleged violations of the First, Second, Fourth, and Fifth Amendments; (3) a motion to dismiss based on double jeopardy; and (4) a motion seeking to have the court instruct the jury that it could nullify the effect of the law in this case. The district court denied these four motions on August 18, 2004.

The trial in this case commenced on October 19, 2004. Immediately prior to the trial, Willaman unsuccessfully moved to dismiss the indictment based on asserted Speedy Trial Act, 18 U.S.C. § 3161 et seq., violations. At the trial's conclusion the jury found Willaman guilty on the superseding indictment. The court subsequently sentenced Willaman to a custodial term of 27 months to be followed by a three-year period of supervised release. Willaman timely appealed. Petitioner's appeal was denied in all respects on February 17, 2006.

REASONS FOR GRANTING THE WRIT

The Writ must be granted because the confusion in the lower courts causes disdain for the judiciary and the unequal treatment from circuit to circuit is unchecked.

> Underneath the social unrest of the world today, as its main underlying cause, is the feeling in the breasts of the masses that justice is not for them. They do not know the cause, nor can they suggest the remedy,—and so they only want to destroy. Society to them has come to mean organized injustice.
>
> John Rustgard, *Dry Bones – The Remedy for the Evil*, 88 Central Law Journal, p. 341, 344 (May 9, 1919).

I. The Second Amendment, U.S. Constitution, is an individual right.

Second Amendment case law in the lower courts can most charitably be described as a shambles.

A few samples of that confusion are used to illustrate the rampant confusion in the lower courts.

In the Ninth Circuit there is no individual right to possess arms.

> Based on our current case law, defendant's Second Amendment challenge to the constitutionality of § 922(g) is without merit. *See Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002) (ruling that the Second Amendment does not confer an individual right to possess arms), *cert. denied*, 540 U.S. 1046 (2003); *see also United States v. Everist*, 368 F.3d 517, 519 (5th Cir. 2004) (rejecting a Second Amendment challenge to the felon-firearm possession statute and holding that § 922(g)(1) "represents a limited and narrowly tailored exception to the freedom to possess firearms, reasonable in its purposes and consistent with the right to bear arms protected under the Second Amendment").
>
> *United States v. Younger*, 398 F.3d 1179 (9th Cir. 2005).

In the Fifth Circuit there is, though apparently Congress has the authority to regulate that right.

> Although, as we have held, the Second Amendment does protect individual rights, that does not mean that those rights may never be made subject to any limited, narrowly tailored specific exceptions or restrictions for particular cases that are reasonable and not inconsistent with the right of Americans generally to individually keep and bear their private arms as historically understood in this country. Indeed, Emerson does not contend, and the district court did not hold, otherwise. As we have previously noted, it is clear that felons, infants and those of unsound mind may be prohibited from possessing firearms.

Id. at 261. *Emerson* also discusses authority that legislative prohibitions on the ownership of firearms by felons are not considered infringements on the

> historically understood right to bear arms protected by the Second Amendment. *Id.* at 226 n. 21.
>
> *United States v. Darrington*, 351 F.3d 632 (5th Cir. 2003).

Thirty years ago the Sixth Circuit decided that there is no *individual* right to possess arms.

> Since the Second Amendment right "to keep and bear Arms" applies only to the right of the State to maintain a militia and not to the individual's right to bear arms, there can be no serious claim to any express constitutional right of an individual to possess a firearm.
>
> It is also established that the *collective right* of the militia is limited to keeping and bearing arms, the possession or use of which "at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, ..."
>
> *United States v. Warin*, 530 F.2d 103, 106 (6th Cir.), *cert. denied*, 96 S.Ct. 3168 (1976) (citations omitted).

More recently the Sixth Circuit has recognized that current firearms laws are unconstitutional.

> [I]t is apparent that the enforcement tactics made possible by current firearms laws are constitutionally, legally, and practically reprehensible. Although Congress adopted the Gun Control Act with the primary object of limiting access of felons and other high-risk groups to firearms, the overbreadth of the law has led to neglect of precisely this area of enforcement. . . . The [BATF's] own figures demonstrate that in recent years the percentage of its arrests devoted to felons in

> possession and persons knowingly selling to them have dropped from 14 percent down to 10 percent of their firearms cases [and that] 55 percent of its gun law prosecutions overall involve persons with no record of a felony conviction, and that a third involve citizens with no police record whatsoever.
>
> *United States v. Cassidy*, 899 F.2d 543, 546 n. 9 (6th Cir. 1990).

In the Third Circuit Petitioner has no Second Amendment rights at all based on a 1996 case.

> Willaman first argues that 18 U.S.C. § 922 ("section 922") violates the Second Amendment, and that "Congress had no right to amend the Second Amendment merely by legislation," Reply Br. at 7. Thus, in his view, the district court should have dismissed the indictment and allowed him to make a jury nullification argument. We review the district court's order upholding the constitutionality of section 922 and refusing to dismiss the indictment or allow a jury nullification argument on a plenary basis. *See United States v. Rybar*, 103 F.3d 273, 275 (3d Cir. 1996). We will not linger on this point inasmuch as a number of our cases, including *Rybar* in which we held that "this court has on several occasions emphasized that the Second Amendment furnishes no absolute right to firearms," 103 F.3d at 286, foreclose Willaman's Second Amendment arguments. Though Willaman argues that *Rybar* "is simply bad law," Reply Br. at 8, plainly it is binding on this panel. See Third Circuit I.O.P. 9.1.
>
> *United States v. Willaman*, 437 F.3d 354 (3d Cir. 2006).

As our most-recently-appointed Supreme Court Justice pointed out in his dissent in *Rybar*, *Rybar* is in fact "simply bad law."

> Was *United States v. Lopez*, 115 S.Ct. 1624 (1995), a constitutional freak? Or did it signify that the Commerce Clause still imposes some meaningful limits on congressional power? The statutory provision challenged in this case, the portion of 18 U.S.C. Section(s) 922(o) that generally prohibits the purely intrastate possession of a machine gun, is the closest extant relative of the statute struck down in *Lopez*, 18 U.S.C. Section(s) 922(q)(1)(A), which made it a federal offense knowingly to possess a firearm in a school zone. Both are criminal statutes that regulate the purely intrastate possession of firearms. Both statutes, departing from the mold of prior federal criminal statutes governing firearms possession, lack a jurisdictional element . . ., that is, they do not require federal prosecutors to prove that the firearms were possessed in or affecting interstate commerce. Compare, *e.g.*, 18 U.S.C. Section(s) 922(d). And in passing both statutes, Congress made no findings regarding the link between the intrastate activity regulated by these laws and interstate commerce. If *Lopez* does not govern this case, then it may well be a precedent that is strictly limited to its own peculiar circumstances. That may be what the majority here would like, see Maj. Op. at 28 (citation omitted) ("challenges based on *Lopez* '[a]lmost invariably' fail"), but our responsibility is to apply Supreme Court precedent. That responsibility, it seems to me, requires us to invalidate the statutory provision at issue here in its present form.
>
> *United States v. Rybar*, 103 F.3d 273 (3d Cir. 1996) (footnotes omitted) (Alito, C.J., dissenting).

Anywhere in the world one can browse the Internet and discover why the Bill of Rights were added to the U.S. Constitution:

> **United States Bill of Rights.** In the United States, the Bill of Rights is the term for the first ten amendments to the United States Constitution. These amendments explicitly limit the Federal government's powers, protecting the rights of the people by preventing Congress from abridging freedom of speech, freedom of the press, freedom of assembly, freedom of religious worship, or *the right to bear arms*, preventing unreasonable search and seizure, cruel and unusual punishment, and self-incrimination, and guaranteeing due process of law and a speedy public trial with an impartial jury.
>
> Wikipedia, free encyclopedia, http://en.wikipedia.org

How is it that those who study history have a perfect understanding of the rights of individuals provided by the United States Constitution and can present it simply and in plain English but federal judges cannot nor can they agree on what they are?

> It is not the technical legal conception that leads to the decisions pronounced by the judge, but it is the decision which the judge intends to pronounce which lead him to the finding of the technical reasons therefor—the decisions themselves being the result of the judge's views on the social and economic questions involved in the solution of the apparently abstract constitutional problems.
>
> Louis B. Boudin, *Government by Judiciary*, Vol. I, page 338 (1932).

Obviously, without guidelines from this Court, the right to bear arms is determined by geographic location within the United States—some individuals have the right while others do not.

Invalidating 18 U.S.C. § 922 is all the Petitioner in *this* action, Terrance Ross Willaman, is asking *this* Court to do *now*.

> The Second Amendment . . . appears to contain an express limitation on the government's authority. That Amendment provides: "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed." This Court has not had recent occasion to consider the nature of the substantive right safeguarded by the Second Amendment. If, however, the Second Amendment is read to confer a *personal* right to "keep and bear arms," a colorable argument exists that the Federal Government's regulatory scheme, at least as it pertains to the purely intrastate sale or possession of firearms, runs afoul of that Amendment's protections. As the parties did not raise this argument, however, we need not consider it here. Perhaps, at some future date, this Court will have the opportunity to determine whether Justice Story was correct when he wrote that the right to bear arms "has justly been considered, as the palladium of the liberties of a republic." 3 J. Story, *Commentaries* § 1890, page 746 (1833) (footnote 2 omitted).
>
> *Printz v. United States*, 117 S.Ct. 2365, 2385-86 (1997) (Justice Thomas, concurring) (footnote omitted).

Federal judges have a duty to enforce the Constitution,

whether they agree with it or not. Lund, *The Second Amendment, Political Liberty, And The Right To Self-Preservation*, 39 Alabama Law Review 103 (1987-1988).

The legislature has recognized that the Second Amendment is an individual right, as has the Executive Branch.

See *The Right to Keep and Bear Arms*, Report of the Subcommittee on the Committee on the Judiciary, United States Senate, Ninety-Seventh Congress, Second Session, February 1982 (legislative position) and *Whether the Second Amendment Secures an Individual Right*, Memorandum Opinion of the Attorney General, August 24, 2004 (executive branch position).

The question that then must be answered by this Court (or the Congress if this Court refuses to do its duty) is this:

What, precisely, did the Second Amendment mean in 1791 when it was enacted?

What did each clause of the Second Amendment mean in 1791?

A Well Regulated Militia

The militia is all citizens capable of bearing arms. *Presser v. Illinois*, 116 U.S. 252, 265 (1886). See also 10 U.S.C. § 311(a), *Houston v. Moore*, 18 U.S. (5 Wheat.) 1 (1820) (militias pre-dated Constitution). See also Lund, *supra*, at 107 n. 8 ("well-regulated" meant properly disciplined [trained]) not government controlled").

The Right of the People to Keep and Bear Arms

The "right of the people to keep and bear arms" did not and does not refer to "sporting purposes." Kopel, *It Isn't About Duck Hunting: The British Origins of the Right To Keep And Bear Arms*, 93 Mich. L. Rev. 1333 (May 1995).

It included not only the right to be armed but to be armed at a level equal to the government. Vandercoy, *The History of the Second Amendment*, 28 Valparaiso Univ. L. Rev. 1007, 1009 (1993-1994).

I.e., if the Government may own machineguns, then "the people" must be allowed to own machineguns. Technically, defendant's weapon was not a machinegun; it was a sub-machinegun, a fully automatic weapon that shot pistol bullets, a weapon so weak, antique, and ineffectual that the rounds from it would not even penetrate a bulletproof vest.

See also, Hays, *The Right to Bear Arms: A Study In Judicial Misinterpretation*, 2 Wm.& Mary L. Rev. 381 (1960). See especially p. 395: Congress has the power to *arm* the militia, not *dis-arm*.

Shall Not Be Infringed

The phrase "shall not be infringed" means precisely that, *not* be *infringed*.

> **Infringement:** An encroachment, as of a right or privilege.—The American Heritage College Dictionary, p. 698 (Third Edition Houghton Mifflin Co. 1993).
>
> **Encroach:** To take another's possession or rights *gradually* or *stealthily*.—*Id.* at 453.

Infringing is exactly what Congress has been doing since 1934.

The right of the people to keep and bear arms shall not be infringed by Congress. *Presser v. Illinois*, *supra* at 267, *United States v. Cruikshank*, 92 U.S. 542, 553 (1875).

For how this Court is supposed to adjudicate a constitutional issue, see *Lake County v. Rollins*, 9 S.Ct. 651, 652 (1889), *Crawford v. Washington*, 124 S.Ct. 1354 (2004) (discussing original intent).

This Court's guidance on this issue is sorely needed in the lower courts.

> The lower courts generally have either adopted an interpretation that is implausible on its face, inconsistent with Supreme Court precedent, and unsupported by historical evidence about the intention of the Framers, or adhered to ancient precedents that

> treated the Bill of Rights as being inapplicable to the States. The Supreme Court, moreover, inscrutably denies all petitions for *certiorari*.
>
> Lund, *supra*.

The Supreme Court's guidance [on the Second Amendment] has been notoriously scant. *Fraternal Order of Police v. United States*, 173 F.3d 898, 906 (D.C. Cir. 1999).

The Supreme Court has shamelessly refused to discuss the issue. Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637, 654 (1990).

The lower appellate courts even disagree with themselves.

The Second Amendment right held by the states, does not protect the possession of a weapon by a private citizen. *Hickman v. Block*, 81 F.3d 98, 101 (9th Cir. 1996).

The Second Amendment embodies the right to defend oneself and one's home against physical attack. *United States v. Gomez*, 81 F.3d 846, 850 n. 7 (9th Cir. 1996). Title 18 U.S.C. § 922(g)(1) subject to justification defense. *Id.* at 851.

II. Congress does not have the authority to regulate the right specified in the Second Amendment, U.S. Constitution, through the enactment of ordinary legislation.

Obviously, the people (or voters) are the *only* political body that can *legitimately* encroach on, infringe, or amend the Constitution via referendum. Article V is quite plain.

> The **only** power to amend the Constitution is contained in Article V, and is a delegated power. *Hawke v. Smith*, 253 U.S. 221 227; *Dodge v. Woolsey*, 18 How. 348. It is a power to "amend," granted in general terms.
>
> *Leser v. Garnett*, 258 U.S. 130, 42 S.Ct. 217, 66 L.Ed.

505 (1922).

Nor can we concur in Mr. Webster's apparent view that when Congress, after full consideration and with the acquiescence and long practice of all the branches of the Government, has established the construction of the Constitution, it may by its mere subsequent legislation reverse such construction. It is not given power by itself thus to amend the Constitution.

Myers v. United States, 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160 (1926).

JUSTICE STEVENS, concurring.
It is important to emphasize the distinction between our two Eleventh Amendments. There is first the correct and literal interpretation of the plain language of the Eleventh Amendment that is fully explained in Justice Brennan's dissenting opinion in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 247 (1985). In addition, there is the defense of sovereign immunity that the Court has added to the text of the Amendment in cases like *Hans v. Louisiana*, 134 U.S. 1 (1890). With respect to the former—the legitimate scope of the Eleventh Amendment limitation on federal judicial power—I do not believe Congress has the power under the Commerce Clause, or under any other provision of the Constitution, to abrogate the States' immunity. **A statute cannot amend the Constitution**.

Pennsylvania v. Union Gas Co., 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989).

Amending the Constitution is precisely what Congress did in the enactment of every "reasonable restriction" of firearms possession since 1934.

Amendment of the Constitution by legislative enactment is prohibited. *United Transp. Union v. ICC*, 891 F.2d 908, 915-916 (D.C. Cir. 1989).

The Third Circuit Court of Appeals appears to have addressed this issue only *once* in the twentieth century, in a concurring in part and dissenting in part opinion.

> Judicial amendment of the Constitution and its Amendments is violative of Article V of the Constitution which provides in relevant part that "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes... when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof...."
>
> Judicial legislation contravenes Article I, § 1 of the Constitution which reserved to the Congress the power to legislate. *American Dredging Co. v. Local 25, AFL-CIO*, 338 F.2d 837, 850 (3d Cir. 1964), *cert. denied*, 380 U.S. 935, 85 S.Ct. 941, 13 L.Ed.2d 822 (1965).
>
> *Polite v. Diehl*, 507 F.2d 119 (3rd Cir. 1974).
>
> "Under the guise of interpreting the Constitution we must take care that we do not import into the discussion our own personal views of what would be wise, just, and fitting rules of government to be adopted by a free people, and confound them with constitutional limitations." 211 U.S. at 106-07.
>
> *Id.*

Inserting their own personal views is *exactly* what the lower courts have done regarding Second Amendment adjudication.

III. A defendant in a federal criminal case has the right to argue his understanding of the Constitution to a jury.

> For to say, they are not at all to meddle with, or have respect to Law in giving their Verdicts, is not only a *false* position, and contradicted by every days *experience*; but also a very *dangerous* and *pernicious* one, tending to defeat the principal end of the Institution of Juries, and so subtilly to *undermine* that which was *too strong* to be *batter'd down*.
>
> Sir John Hawles, *The English-man's Right*, pp. 10-11 (1680) (Solicitor-General of England in the reign of William III).
>
> [U]ltimately, the guarantee of [our] rights is no stronger than the integrity and fairness of the judge to whom the trial is entrusted.
>
> *Bracy v. Gramley*, 81 F.3d 684, 703 (7th Cir. 1996) (dissent), *reversed*, 520 U. S. 899, 117 S.Ct. 1793 (1997).
>
> It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law.
>
> *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 179 (1951) (Douglas, J., concurring).

Those rights are also entrusted to the *jury*.

> Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority....If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.
>
> *Duncan v. Louisiana*, 391 U.S. 145, 156, 88 S.Ct. 1444, 1451, 20 L.Ed.2d 491 (1968).

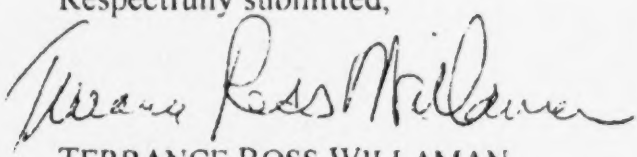
Forcing a jury to merely be a rubber stamp by "one judge" enables the "unchecked power" of the federal government to trample the rights of citizens. If a jury is not allowed to determine if a statute violates fundamental constitutional principles, the Bill of Rights and in particular the Second Amendment is absolutely worthless.

If Constitutional provisions and arguments are *denied* to the jury, then the judge has become the sole fact-finder in the trial.

CONCLUSION

For the reason set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,



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Pro se Petitioner

Dated: May 5, 2006

APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-1336

UNITED STATES OF AMERICA

v.

TERRANCE ROSS WILLAMAN,
Appellant

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Crim. No. 04-00028-1E)
Honorable Maurice B. Cohill, Jr., District Judge

Submitted under Third Circuit LAR 34.1(a)
December 9, 2005

BEFORE: RENDELL, FISHER, and GREENBERG, *Circuit Judges*.

(Filed: February 17, 2006)

OPINION OF THE COURT

GREENBURG, *Circuit Judge*.

I. INTRODUCTION

This matter comes on before this court on defendant Terrance Ross Willaman's appeal from a judgment of conviction and sentence entered on January 27, 2005, in the district court.[1] The case originated on March 26, 2004, when Maurice Ferentino, an ATF agent, and two other federal agents approached Willaman at a hotel in Erie, Pennsylvania, where he was staying with his wife. Ferentino, who had obtained information that Willaman possessed a machine gun, at that time intended to serve a grand jury subpoena on him, apparently related to an ongoing investigation regarding weapons matters.[2] Willaman admitted to Ferentino at the hotel that he possessed a machine gun but told Ferentino that he would turn it over to the agents. Willaman and the agents subsequently left the hotel in separate cars to retrieve the weapon at Willaman's residence. Once they arrived at the residence, he dug up the machine gun from the place where he had buried it, and the agents took possession of it. Nevertheless, notwithstanding Willaman's apparent criminal conduct, Ferentino twice informed him that he was free to go at any time. Moreover, Willaman has acknowledged that he was not coerced or treated badly in any way by the agents at his residence.

On May 11, 2004, a grand jury indicted Willaman for knowingly and unlawfully possessing a firearm in violation of 26 U.S.C. § 5861(d), and, on September 15, 2004, a grand jury returned a superseding indictment charging Willaman with knowingly and unlawfully possessing a machine gun in violation of 18 U.S.C. § 922(o)(1). Following the original indictment, Willaman appeared before a magistrate-judge on

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[1] The district court had jurisdiction under 18 U.S.C. § 3231, and we have jurisdiction under 28 U.S.C. § 1291.

[2] Ferentino recently had arrested Darrell Sivik who informed Ferentino he had transferred a machine gun to Willaman

May 12, 2004, at which time she set bail. Nevertheless, Willaman was not arraigned until May 17, 2004, at which time he pleaded not guilty. On May 25, 2004, eight days after his arraignment, Willaman filed several pre-trial motions: (1) a motion to dismiss the indictment under Federal Criminal Rule 12(b)(2); (2) a motion to dismiss and a motion to suppress statements and evidence based on alleged violations of the First, Second, Fourth, and Fifth Amendments; (3) a motion to dismiss based on double jeopardy; and (4) a motion seeking to have the court instruct the jury that it could nullify the effect of the law in this case. The district court denied these four motions on August 18, 2004.

The trial in this case commenced on October 19, 2004. Immediately prior to the trial, Willaman unsuccessfully moved to dismiss the indictment based on asserted Speedy Trial Act, 18 U.S.C. § 3161 *et seq.*, violations. At the trial's conclusion the jury found Willaman guilty on the superseding indictment. The court subsequently sentenced Willaman to a custodial term of 27 months to be followed by a three-year period of supervised release. Willaman timely appealed.

II. DISCUSSION

A. *Second Amendment*

Willaman first argues that 18 U.S.C. § 922 ("section 922") violates the Second Amendment, and that "Congress had no right to amend the Second Amendment merely by legislation," Reply Br. at 7. Thus, in his view, the district court should have dismissed the indictment and allowed him to make a jury nullification argument. We review the district court's order upholding the constitutionality of section 922 and refusing to dismiss the indictment or allow a jury nullification argument on a plenary basis. *See United States v. Rybar*, 103 F.3d 273, 275 (3d Cir. 1996). We will not linger on this point inasmuch as a number of our cases, including *Rybar* in which we held that "this court has on several occasions emphasized that the Second Amendment

furnishes no absolute right to firearms," 103 F.3d at 286, foreclose Willaman's Second Amendment arguments. Though Willaman argues that Rybar "is simply bad law," Reply Br. at 8, plainly it is binding on this panel. *See* Third Circuit I.O.P. 9.1.

B. *Speedy Trial Act*

Next, Willaman argues that he was denied the right to a speedy trial under 18 U.S.C. § 3161(c)(1), a section of the Speedy Trial Act. Willaman asserts that "[e]ven excluding the time of filing and ruling on pretrial motions," more than 100 days passed between his arraignment and the commencement of his trial, which exceeded the 70 days allowed under section 3161(c)(1). App. at 22. We exercise plenary review over the district court's application of the Speedy Trial Act. *See United States v. Hamilton*, 46 F.3d 271, 273 (3d Cir. 1995).

The Speedy Trial Act provides that if a plea of not guilty is entered, the trial of a defendant charged in an information or indictment "shall commence within seventy days from the filing date (and making public) of the information or indictment or from the date the defendant has appeared before a judicial officer of the court in which the charge is pending, whichever date last occurs." Section 3161(c)(1); *Gov't of Virgin Islands v. Duberry*, 923 F.2d 317, 320 (3d Cir. 1991). However, delay during the time between the filing of a pretrial motion "through the conclusion of the hearing on, or other prompt disposition of, such motion" is excluded from the computation of Speedy Trial Act time. Section 3161(h)(1)(F); *see United States v. Arbelaez*, 7 F.3d 344, 347 (3d Cir. 1993).

Inasmuch as Willaman did not appear before a judicial officer prior to his original indictment, his arraignment on May 17, 2004, at which time he pleaded not guilty, constituted his initial appearance for Speedy Trial Act purposes, and thus that appearance triggered the running of the Speedy Trial Act 70-day time period. Our conclusion on this point is in harmony with our opinion in *United States v.*

Carrasquillo, 667 F.2d 382, 384 (3d Cir. 1981), in which we said that "[w]hen there is no [pre-indictment] appearance because an information or indictment is the first step in a criminal case, then *postindictment arraignment* will be the relevant 'last occurring' date." (emphasis added).[3] We recognize that Willaman physically appeared before a magistrate judge on May 12, 2004, at which time she set bail, and we further recognize that section 3161(c)(1) indicates that the 70-day clock runs from the time the defendant "has appeared" before a judicial officer. Nevertheless, inasmuch as Willaman did not plead on May 12, 2004, the Speedy Trial clock did not begin to run until May 17, 2004, when he was arraigned and pleaded not guilty as *Carrasquillo* indicated that an arraignment triggers the running of the 70-day period. *See also United States v. Zandi*, 769 F.2d 229, 233 (4th Cir. 1985) ("Since the appellants, in the instant case, appeared before a judicial officer *after* the date of the indictment, *the dates of arraignment, and not the date of indictment*, are relevant to our Speedy Trial inquiry.") (emphasis partially added); *United States v. Haiges*, 688 F.2d 1273, 1274 (9th Cir. 1982) ("When a defendant is indicted prior to his arrest, the seventy-day pretrial period runs from the date of his *arraignment*.") (emphasis added). In this regard we point out that under Federal Rule of Criminal Procedure 10(a) an arraignment requires the court to ask "the defendant to plead to the indictment or information," an event that occurred here on May 17, 2004.

We have not overlooked the arguable anomaly in the distinction between the effect of a defendant's pre-indictment and post-indictment appearance under section 3161(c)(1). After all, under *Carrasquillo* a defendant's pre-indictment physical appearance before a magistrate judge will constitute a defendant's "appearance before a judicial officer," 667 F.2d at 384, so that his subsequent indictment will trigger the running of the 70-day period even though he could not have pleaded before his indictment and thus could not have been

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[3] We realize that the statement in *Carrasquillo* that we quote is dictum as in that case there was a pre-indictment appearance so the indictment started the 70-day clock.

arraigned at his appearance before his indictment.[4] Yet under our result a post-indictment physical appearance will not trigger the running of the 70-day clock until the defendant pleads, or at least is asked to do so, because in the absence of that request he will not have been arraigned.

Nevertheless we are satisfied that the distinction is justified. As we indicated in *Carrasquillo*, the courts are required to treat an indictment of a defendant as the triggering event for running the clock under section 3161(c)(1) when a defendant has appeared before a judicial officer prior to indictment because otherwise "the date of an indictment could never be the date that 'last occurs' under section 3161(c)(1)," 667 F.2d at 384, so that the choice of triggering events between when the defendant "has appeared" or is indicted would be superfluous. On the other hand, if the defendant has not physically appeared before a judicial officer prior to indictment, as is the case here, then the indictment never can be the triggering event under section 3161(c)(1). Consequently, a court has flexibility in determining what Congress meant when it used the words "has appeared" in a case in which a defendant's first appearance is after his indictment that a court could not have when the defendant physically has appeared before a judicial officer prior to his indictment.

We think that it is logical to hold that Congress intended when a defendant's first appearance before a judicial officer is after an indictment for purposes of section 3161(c)(1), the appearance must be an arraignment to trigger the 70-day period. That result is consistent with section 3161(c)(1) as the section, by its terms, is applicable only in a "case in which a plea of not guilty is entered" and until the arraignment there could not have been a plea. Moreover,

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[4] Federal Rule of Criminal Procedure5(d)(4), dealing with initial appearances, provides that in a felony case "[a] defendant may be asked to plead only under Rule 10," which, in turn, sets forth that at an arraignment the court asks "the defendant to plead to the indictment or information." Fed. R. Crim. P. 10(a)(3). Thus, in this felony case in which the prosecution was by an indictment, Willaman could not have been arraigned before his indictment.

until the plea is entered the parties cannot know whether section 3161(c)(1) can become implicated in the case as in the absence of a not guilty plea there will not be a trial.[5] Finally, we point out that the time interval between a defendant's post-indictment appearance that is something less than an arraignment and an actual arraignment is not likely to be great. Indeed, in this case the period was only five days. Thus, we are comfortable with our result which is compatible with section 3161(c)(1).[6]

Of course, in this case the period between Willaman's arraignment on May 17, 2004, and the commencement of his trial on October 19, 2004, far exceeded 70 days. But as we have indicated, on May 25, 2004, eight days after his arraignment, Willaman filed several pretrial motions. As we also have indicated the filing of a pretrial motion tolls the running of the 70-day period. Consequently, the running of the 70-day clock was tolled from May 25, 2004, until August 18, 2004, when the court denied the motions. Willaman's trial then commenced on October 19, 2004, 61 days after August 18, 2004. Those 61 days coupled with the seven days that elapsed between Willaman's arraignment on May 17, 2004, and his filing pretrial motions on May 25, 2004, do not exceed the 70-day time limit under the Act as only 68 non-excludable days passed before the trial started. *See United States v. Yunis*, 723 F.2d 795, 797 (11th Cir. 1984) ("In calculating includable time [for Speedy Trial Act purposes] both the date on which an event occurs or a motion is filed and the date on which the court disposes of a motion are excluded."). Accordingly, Willaman's trial commenced

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[5] We understand that this reasoning cannot apply when the defendant's first appearance is before the indictment but this consequence of section 3161(c)(1)is unavoidable in view of the meaning of section 3161(c)(1) as explained in *Carrasquillo*.

[6] The government has not contended that the return of the superseding indictment started the running of the Speedy Trial Act 70-day period anew and does not contend that by waiting until immediately prior to the trial to move to dismiss Willaman waived his Speedy Trial Act dismissal argument. Accordingly, we have not considered these possible arguments.

within the 70-day period the Speedy Trial Act allows, and we reject his contentions under that statute.

C. *Motion to Suppress*

Next, Willaman argues that the district court erred in denying his motion to suppress statements and evidence on the grounds that they were obtained in violation of the Fourth and Fifth Amendments. In reviewing the district court's denial of Willaman's motion to suppress, "we exercise plenary review with respect to the district court's determination as to whether the police conduct found to have occurred constitutes custodial interrogation under all the circumstances of the case." *United States v. Leese*, 176 F.3d 740, 741 (3d Cir. 1999).

A person is in custody when he either is arrested formally or his freedom of movement is restricted to "the degree associated with a formal arrest." *Id.* at 743 (citation and internal quotation marks omitted). For a person to be in custody when he has not been arrested, "something must be said or done by the authorities, either in their manner of approach or in the tone or extent of their questioning, which indicates that they would not have heeded a request to depart or to allow the suspect to do so." *Steigler v. Anderson*, 496 F.2d 793, 799 (3d Cir. 1974) (quoting *United States v. Hall*, 421 F.2d 540, 545 (2d Cir. 1969)). Thus, "police officers are not required to administer *Miranda* warnings to everyone whom they question." *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S.Ct. 711, 714 (1977). *Miranda*, of course, requires warnings only when the person the police are questioning is in custody. *Miranda v. Arizona*, 384 U.S. 436, 468, 86 S.Ct. 1602, 1624 (1966).

Courts consider a variety of factors when determining if a person was in custody, including: (1) whether the officers told the suspect he was under arrest or free to leave; (2) the location or physical surroundings of the interrogation; (3) the length of the interrogation; (4) whether the officers used coercive tactics such as hostile tones of voice, the display of weapons, or physical restraint of the suspect's movement;

and (5) whether the suspect voluntarily submitted to questioning. *See United States v. Czichray*, 378 F.3d 822, 827 (8th Cir. 2004); *United States v. Hayden*, 260 F.3d 1062, 1066 (9th Cir. 2001); *United States v. Crossley*, 224 F.3d 847, 861 (6th Cir. 2000).

Here, Ferentino twice told Willaman that he was free to leave. Furthermore, Willaman turned the machine gun over to authorities while at his own residence, after leading the federal agents to his premises in his own vehicle. *See United States v. Czichray*, 378 F.3d at 826 ("When a person is questioned *on his own turf*, . . . the surroundings are not indicative of the type of inherently coercive setting that normally accompanies a custodial interrogation.") (emphasis added) (citations and internal quotation marks omitted). While we recognize that Willaman contends that Ferentino said that they "could do it the hard way or the easy way," at the hotel with respect to recovering the machine gun, and showed Willaman a newspaper photo of a raid taking place, these circumstances do not render the circumstances surrounding his interrogation "custodial." Moreover, the record does not show that the agents used physical force or restrain or verbally intimidate Willaman nor did they display weapons or interrogate him at length.

Finally, we see no basis from the record to conclude that there were other circumstances indicating that Willaman was the subject of a custodial interrogation. Therefore, it would be unreasonable to conclude that Willaman's incriminating statements to the federal agents were not freely and voluntarily made at a time that he was not in custody or that he did not freely and voluntarily turn the machine gun over to the agents. Of course, in these circumstances *Miranda* is not implicated. Accordingly, his statements and the physical evidence were not obtained in violation of his Fourth or Fifth Amendment rights.

D. *Grand Jury Indictment*

Finally, Willaman argues that the grand jury did not make a "preliminary investigation" and that by reason of this

failure the indictment against him must be dismissed. He seems to predicate this argument on the point that the foreperson of the grand jury did not sign the indictment.[7] We are exercising plenary review on this issue. *See United States v. Irorere*, 228 F.3d 816, 830 (7th Cir. 2000).

It is true that the Federal Rules of Criminal Procedure state that indictments are to be signed by both the foreperson of the grand jury and by an attorney for the government. *See* Fed. R. Crim. P. 6(c) ("The foreperson . . . will sign all indictments."); Fed. R. Crim. P. 7(c)(1) ("The indictment . . . must be signed by the attorney for the government."). Nonetheless, the Supreme Court has indicated that the "foreman's duty to sign the indictment is a formality, for the absence of the foreman's signature is a mere technical irregularity that is not necessarily fatal to the indictment." *Hobby v. United States*, 468 U.S. 339, 345, 104 S.Ct. 3093, 3096 (1984); *see also Frisbie v. United States*, 157 U.S. 160, 163-65, 15 S.Ct. 586, 587-88 (1895) (failure of grand jury foreman to sign indictment is nonfatal irregularity).

In this case we see no reason to believe that the indictment on which Willaman was tried was not *bona fide* or that the absence of the foreperson's signature prejudiced Willaman. Consequently, we regard the failure of the grand jury foreperson to sign the indictment as a mere technical deficiency, and thus conclude that Willaman's challenge to the sufficiency of the indictment does not raise an issue entitling him to relief.[8] *See Irorere*, 228 F.3d at 831.

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[7] The foreperson did not sign either the original or superseding indictment.

[8] Willaman has filed a motion asking us to take judicial notice of an advertisement in a publication entitled Shotgun News. We deny this motion as it is without merit inasmuch as the advertisement merely reflects the views of its author and the allegations in it do not set forth facts of which we may take judicial notice. See Buczek v. Cont'l Cas. Ins. Co., 378 F.3d 284, 291 (3d Cir. 2004) (testimony that 90-mile-per-hour winds sometimes hit the New Jersey shore is a "disputed fact is not one that is appropriate for judicial notice")

III. CONCLUSION

For the foregoing reasons the judgment of conviction and sentence entered January 27, 2005, will be affirmed.

In our disposition of this case we have recognized that Willaman's arguments are somewhat broader than the way we restate them. Nevertheless, we have considered all his points and find that they either are subsumed in the points as we have restated them or are without merit.